

Towards Global Abolition of the Death Penalty: Progress and Prospects

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1. Introduction

My friends at the death penalty project, with whom I have had the great pleasure of working during the last 10 years, have asked me to try to provide an up-to-date survey and analysis of the extent to which and reasons why more and more countries have in recent years embraced the goal laid down by a resolution of the United Nations General Assembly in 1971, which stated: ‘in order to fully guarantee the right to life, provided for in article 3 of the Universal Declaration of Human Rights, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment might be imposed, with a view to the desirability of abolishing this punishment in all countries’. I shall also speculate on the possibility that world wide abolition will be achieved within the foreseeable future.²

This survey will reveal that over the last 20 years or so a ‘new dynamic’ has been at work: one which has sought to move the debate about capital punishment beyond the view that each nation has the sovereign right to retain the death penalty as a repressive tool of its criminal justice system on the grounds of its purported utility or cultural expectations of its citizens, and instead to ban its use on the grounds that the punishment of death inevitably, and however administered, violates universally accepted human rights: namely, the right to life and the right not to be subjected to a cruel, inhuman or

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degrading treatment or punishment. There remain challenges ahead to get this view accepted by all countries, but I believe that the movement to abolish the death penalty worldwide now looks irresistible. I shall conclude with the optimistic assessment that those states that still retain it in law and use it in practice will become more and more isolated. They will come under increasing pressure to protect the human rights of all their citizens, even the worst behaved among them, and to accept an international human rights norm that rejects completely an outmoded, cruel and dehumanising punishment.

2. The movement for reform: How far and how fast had it progressed?

If one takes the beginning of the movement to abolish the death penalty to be the publication in 1764 of Cesare Beccaria's famous book *On Crimes and Punishments*, one can certainly say that over the next 200 years progress towards that objective was gradual, indeed slow and uncertain. By the time that the Universal Declaration of Human Rights was promulgated in 1948, there were still only eight independent states that had abolished the death penalty for all crimes in all circumstances, the majority in South America, the only one in continental Europe being the tiny Italian city state of San Marino. Six other European countries had abolished it for murder and other crimes, but retained it for treason and certain crimes committed in time of war. Three of these (Denmark, Netherlands and Norway) executed collaborators and others guilty of war crimes after the Second World War. Fourteen countries hardly constituted a pressure group. So no wonder that there was no mention at that time of the death penalty in relation to article 3 of the Universal Declaration of Human Rights (that 'every human being has an inherent right to life') and that it was explicitly made an exception to the right to life when the European Convention on Human Rights was established in 1950. By 1966, the year that the International Covenant on Civil and Political Rights (ICCPR) was approved by the United Nations General Assembly (it came into effect 10 years later), there were still only 26 abolitionist countries, several of them very small states,³ and only 12 had abolished it for all crimes, in peacetime and wartime, in civil and military law – West Germany being the only large European country among them. Again, especially when it is noted that the text of Article 6 of the ICCPR, which guarantees an

³ Plus nine states in the USA, two in Australia and 24 of the Mexican states.

inherent right to life had been drafted in 1957, it is not surprising that it did not ban the death penalty. All that could be achieved (in Article 6(2)) was to attempt to restrict the scope of the death penalty in countries that retained it, to ‘the most serious crimes’, an exceptionally vague and potentially elastic concept. Nevertheless, the direction that policy ought to take was indicated by Article 6(6)) which stated that ‘Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the ...Covenant’. And this was emphatically endorsed, as I mentioned earlier, by the UN Resolution of 1971. There was, however, not much optimism about whether and when total abolition could be achieved.

Firstly, as the renowned French jurist Professor Marc Ancel had spelled out in 1962 in a report on the death penalty in European Countries, the typical sequence of events leading to abolition had until then:

“usually taken a long time (my emphasis) and followed a distinctive pattern; first the reduction of the number of crimes legally punishable by death until only murder (and sometimes) treason are left, then systematic use of commutation, leading to *de facto* abolition, and eventual abolition *de jure*.”

Secondly, it was a sequence which, Ancel believed, did not necessarily envisage the complete and final abolition of capital punishment whatever the circumstances might be in the future. He put it thus:

“Even the most convinced abolitionists realise that there may be special circumstances, or particularly troublous times, which justify the introduction of the death penalty for a limited period.”⁴

So while countries might abolish it for ordinary crimes, including murder, they typically wanted to hang on to it for possible use for crimes that threatened the state and in the circumstances of war, especially for offences against military discipline.

Pessimism was evident as recently as 1986, when the distinguished German criminologist, Professor Günther Kaiser, writing in the United Nations *Crime Prevention*

⁴ Cited in Hood and Hoyle, 4th ed. 2008, at 12.

and *Criminal Justice Newsletter*, at a time when some 130 countries still retained the death penalty in law, concluded:

“Today there appears to be little hope that international bodies, whether private or official, will be able to achieve unanimity [among] the majority of countries concerning the restriction or abolition of capital punishment. Efforts aiming at world-wide abolition therefore have to be regarded as a means of keeping the international discussion going”.

His pessimism was shared within the United Nations: for the Introduction to the *Newsletter*, written by UN staff, had concluded with the words “it would appear that the goal of the abolition of capital punishment throughout the world remains remote”.⁵

We should recall that although it is 40 years ago, in December 1969, that Parliament voted to confirm the Murder (Abolition of Death Penalty) Act of 1965, it is only 15 years since the last Parliamentary debate took place in 1994, after 13 previous occasions, on whether the death penalty for some types of murder should be re-instated. And it has only been just over 11 years, in 1998, since the death penalty was finally expunged altogether from the civil criminal law when it was abolished for piracy and treason and subsequently in the same year from military law. This country finally ratified in 1999 Protocol No 6 to the European Convention on Human Rights (which had come into effect 13 years earlier in 1983), and Protocol No 2 to the International Covenant on Civil and Political Rights, adopted 10 years earlier in 1989, both banning the use of the death penalty in peacetime.

I have begun with these remarks because they illustrate how very different the situation and the prognosis were with regard to the abolition of the death penalty less than a quarter of a century ago than they are today.

2. The movement for reform: How far and how fast has it progressed in the last quarter of a century?

At the end of 1988, the abolitionist movement, still encompassed only 52 (29%) of the then 180 member states of the United Nations, only 35 of whom –less than one fifth of all

⁵ G. Kaiser, ‘Capital Punishment in a Criminological Perspective’ *United Nations Crime Prevention and Criminal Justice Newsletter*, 12 and 13 (1986),10-18 at 16 and Introduction, at 4.

nations – had eliminated it altogether from their penal and military codes – the remaining 17 reserving it for crimes against the state and under military law in time of war. Since then the number of abolitionist nations has doubled to 103 of the 196 member states. But now the vast majority, 95 of them, has abolished it for all crimes in all circumstances. In the USA, the states of New Jersey and New Mexico recently abolished capital punishment and the death penalty has not been reinstated in New York State after the state Supreme Court had found it to be unconstitutional; bringing the number of abolitionist states to 15, plus the District of Columbia. Among the 93 countries that retain the death penalty in law only 45⁶ have executed anyone within the past 10 years – less than a quarter of all nations. Of the remaining 48, Amnesty International regards 36 of them as truly ‘abolitionist in practice’, because they have announced or implied that they have a settled policy not to carry out executions. Thus, when these 36 are added to the countries that are abolitionist in law, 71 per cent (139/196) of states no longer inflict or intend to inflict the ultimate penalty. And at the United Nations in December 2008, 106 countries voted in favour of a resolution calling for a world-wide moratorium on death sentences and executions, 34 abstained and only 46 countries voted against. A new dynamic, producing a new pattern of abolition, has been responsible for this extraordinary change.

3. Evidence of a ‘New Dynamic’

What new characteristics have been observed over the past two decades?

First: The abolitionist movement has been embraced across the globe by many different political systems, peoples and cultures.

- It has now spread far beyond its cradle in Europe and South America. It has been embraced almost entirely in the former Soviet Empire, where only Belarus now retains and uses capital punishment. Russia, pending abolition remains staunchly abolitionist in practice. The fact that Belarus abstained on the moratorium resolution at the UN in 2008, that it has aspirations to join the Council of Europe,

⁶ In 2010 it will be 10 years since executions were carried out in Trinidad and Tobago, Sierra Leone and the Bahamas.

and that plans are afoot to introduce its own moratorium on executions, indicate that it will probably not be long before capital punishment, already much restricted, is abandoned altogether. In South and Central America only three small countries (Belize, Guyana and Suriname) hang on to it, although none have carried out an execution for at least 10 years. There have been no executions in Cuba since 2003 and Cuba abstained on the recent moratorium resolution at the UN.

- At the end of 1988 in the African region only Seychelles (1979) and Cape Verde (1981) had abolished capital punishment,⁷ whereas 15 countries are now completely abolitionist (the most recent being Burundi and Togo)⁸ and another 22 have not carried out an execution for at least 10 years (all but four being truly ‘abolitionist in practice’, according to Amnesty International),⁹ Amnesty International reported judicial executions in only two countries in Africa South of the Sahara in 2008 (Botswana and Sudan) and in November 2008 a resolution calling for a moratorium on all executions in African countries was adopted by the African Commission on Human and People’s Rights.
- Although countries in the Middle East and North Africa where Islam is the dominant religion retain the death penalty, several of them – Tunisia, Algeria and Morocco – have not carried out any judicial executions for over 10 years, nor have executions occurred frequently in most of the Gulf States. Abolition is being considered in Jordan, Morocco and Lebanon (all of which abstained in the moratorium vote at the United Nations in December 2008 along with five other Muslim countries, while Algeria and Somalia voted in favour). It is notable that several secular states with large Muslim majorities have already joined the

⁷ The African Union member states that still retain the death penalty and have carried out executions within the past 10 years are: Botswana; Chad; Congo (Democratic Republic); Egypt; Equatorial Guinea; Ethiopia; Guinea; Libya; Nigeria; Somalia; Sudan; Uganda and Zimbabwe.

⁸ Angola, Burundi, Cape Verde, Côte d’Ivoire, Djibouti, Guinea Bissau, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Senegal, Seychelles, South Africa and Togo.

⁹ Benin, Burkina Faso, *Cameroon*, Central African Republic, *Comoros*, Congo (Brazzaville), Eritrea, Gabon, Gambia, Ghana, Kenya, Liberia, *Lesotho*, Madagascar, Malawi, Mali, Mauritania, Niger, *Sierra Leone*, Swaziland, Tanzania, Zambia. Those not regarded by Amnesty International as truly abolitionist in practice are in italics.

abolitionist movement: such as Albania, Azerbaijan, Bosnia-Herzegovina, Kyrgyzstan, Turkey, Turkmenistan and Senegal. They may soon be joined by the Maldives. In fact, only five – a handful – of retentionist Muslim countries make regular and large scale use of capital punishment as a crime control measure: Iran, Saudi Arabia, Pakistan, Iraq and Yemen. According to Arab human rights scholars, whether and at what speed retentionist Islamic states will move towards abolition will depend on whether their legal systems remain dominated by fundamentalist interpretations of Islam, or whether these states move towards secular democratic government, which will allow for a more modern, ‘scientific’, less authoritarian and more merciful interpretation of the Sharia.¹⁰ Overall, the prospects for a steady movement towards abolition in the Muslim world are not nearly as bleak as some may imagine.

- While only four Asian states (Nepal, Bhutan, Cambodia and Philippines) have so far completely abolished the death penalty, six others are now abolitionist *de facto*, including most recently South Korea.¹¹ In Taiwan where there have been no executions since the end of 2005, the Ministry of Justice has issued a policy statement favouring abolition in the future, and following the recent embodiment of the ICCPR into national legislation it looks likely that abolition will be achieved within two or three years. Just one week ago (January 14th 2010), it was reported that President Elbegdorj of Mongolia had called on the Mongolian Parliament to follow the path of the majority of the world’s countries and abolish the death penalty. In announcing that he would commute the death sentences for all those on death row, he declared: “The road a democratic Mongolia has to take ought to be clean and bloodless”. In India – with the second largest population in the world – the death penalty is in principle to be imposed in only the ‘rarest of rare’ cases. Death sentences are imposed but the last execution took place in 2004, the first since 1997. Executions are purely symbolic: a few carried out now and then cannot be

¹⁰ See, for example, M. Cherif Bassiouni ‘Death as a penalty in the *Shari’ā*’ in Peter Hodgkinson and William A. Schabas (eds.), *Capital Punishment, Strategies for Abolition*, Cambridge University Press, 2004, 169-185.

¹¹ Brunei Darussalam, Laos, Maldives, Myanmar, South Korea and Sri Lanka..

regarded as a tool of criminal justice in such a populous country. In Japan, a recent surge in the annual number of execution – 15 in 2008 – looks like coming to an end with the appointment by the newly elected Democratic Party last autumn of a Minister of Justice, Keiko Chiba, who has been a vigorous opponent of capital punishment and so unlikely to sanction executions. Vietnam, like China, has entered into dialogues with the European Union, on the scope of capital punishment. Furthermore, Vietnam chose to abstain at the United Nations on the moratorium resolution in December 2008. It is indicative of a more open mind on the issue in China, that despite the secrecy which surrounds data on executions, and the recent execution of a British citizen, Mr Akmal Shaikh, for the importation of heroin, that nearly three years ago the representative of the PRC at the UN Human Rights Council, Mr La Yifan, stated that ‘The death penalty’s scope of application was to be reviewed shortly, and it was expected that this scope would be reduced, with the final aim of abolishment’. I shall have more to say about China later.

- Only five nations which abolished capital punishment since 1961, reintroduced it,¹² but only one of them – the Philippines – resumed executions (7 in 1999 and 2000). Then, after a moratorium, the death penalty was abolished again in June 2006 by overwhelming majorities of both the Senate and Congress with the full support of the President.

Second: The steps to abolition have changed.

- Fifty-one (94%) of the 54 nations that abolished the death penalty for the first time since the end of 1988 had, by the end of 2009, abolished it for all crimes completely. Only three countries had abolished it solely for murder and other ordinary crimes (Chile, Kazakhstan, and Latvia). Forty-three of the 51 had gone straight from being retentionist to complete abolition, without first abolishing it for ‘ordinary’ crimes only. In other words 84 per cent moved straight from

¹² Nepal (1985), the Philippines (1987), Gambia (1991), Papua New Guinea (1995), and Liberia (for kidnapping and murder in 2008, despite having ratified Protocol No 2 to the ICCPR abolishing the death penalty). It was abolished again in Nepal for ordinary crimes in 1990 and for all crimes in 1997.

retention of the death penalty for murder and sometimes other 'ordinary' and military crimes to complete abolition. A quite different pattern from that observed in the past.

- Over half of the countries that have joined the abolitionist movement and abolished capital punishment completely since 1988 have also ensured through their own constitutions, or through interpretation of the Constitution by the Courts, as for example in Hungary, South Africa and the Ukraine, that the death penalty cannot be reintroduced.

Third: The gap between the last execution and total abolition has become much shorter.

- Only a minority, 21 of the 54 countries that first abolished the death penalty since 1988, had been through a 10-year abolitionist *de facto* stage. The majority moved much faster. For example, Turkmenistan abolished capital punishment in 1999, just two years after the last execution; South Africa in 1995 just four years after. Thus, the pattern of a long drawn-out process leading to abolition was not observed in *well over half* of those countries that have embraced abolition in the last 20 years.

Fourth: Where abolition has not yet been achieved:

- There has been a movement, in line with article 6(2) of the ICCPR, to restrict the number of crimes for which the penalty is death, examples are Belarus and Vietnam. And where the death penalty has been restricted to murder, it has almost everywhere been made discretionary rather than mandatory (the latest country in the process of doing so being Barbados). Here the Death Penalty Project has played a major role.
- Also, the number of countries that carry out executions *regularly* is now very small. In 2008 only 25 countries were known to Amnesty International to have carried out a judicial execution, compared with 38 in 1998. And between 2004 and 2008 only 13 countries carried out at least one execution every year. With a

few exception, such as Iran, the number of executions annually recorded appears to be falling almost everywhere. Even, Singapore, which in the 1990s had the world's highest execution rate per head of population, has reined in executions. They have fallen from 76 in 1994 to only two in 2007 and probably one in 2008.

- Although about 30 countries still retain the death penalty for certain dangerous drugs offences, about 28 for some sexual offences, and about 22 for various non-violent serious property or economic offences, and may impose death sentences for such crimes, it appears that the number of them that regularly carry out executions for crimes other than murder is now quite small, most notably China, Iran, Saudi Arabia, Vietnam, and North Korea, although Singapore, Malaysia, Indonesia and Thailand still do so at times for trading in narcotics. It can nevertheless be safely said that in most retentionist countries capital punishment is now an *exceptional* penalty, limited on a discretionary basis to murder.

- In the United States, the number of death sentences imposed annually fell from 328 in 1994 to only 111 in 2008. In 2009, 40 of the 51 US state jurisdictions had no executions: this meant that only 11, under a third of the states with the death penalty available, actually executed anyone. While in 1999, 98 persons were executed in the USA, 52 were in 2009, almost half of them (24) in Texas alone. In most death penalty states executions are sporadic. Indeed, since 1976, 16 of the states with the death penalty have executed no more than six people – an average of less than one every five years. Eighty per cent of executions have been carried out in just nine States – all in the American south.¹³ The impression often given, that in America there is enthusiasm everywhere for executions is now wide of the mark. I shall have more, in conclusion, to say about this.

- It is also highly significant, as many of you will be aware, that the death penalty was excluded as a punishment by the UN Security Council when it established the International Criminal Tribunals to deal with atrocities in the former Yugoslavia

¹³ Texas, Virginia, Oklahoma, Missouri, North Carolina, South Carolina, Georgia, Alabama and Florida

in 1993 and Rwanda in 1994, and later in Sierra Leone and Lebanon. Nor is it available as a sanction for genocide, other grave crimes against humanity and war crimes in the Statute of the International Criminal Court established in 1998. This has raised the inevitable question: If it is not available for these atrocious crimes why should it be the punishment for lesser crimes?

Taken together, these facts suggest that many, probably the majority, of retentionist countries are not wedded to, or reliant upon, executions to enforce the criminal law. Thus, the remaining retentionist states should not be regarded as a 'rump' of states committed to continuing executions: many of them appear to be moving towards a minimal and marginal use of capital punishment where death sentences continue to be imposed for a symbolic purpose rather than their enforcement being regarded as a necessary element of penal practice. This portends a further increase in the number of abolitionist countries as they too come in the not too distant future to accept the ideology that has spurred so many countries within such a short space of time to abolish or severely curtail their use of capital punishment.

4. Factors generating the 'new dynamic'

So why has this movement towards universal abolition made such headway over the last 20 years? What has been the motivating ideological force and by what political processes has the goal been achieved?

There can be no doubt that the latest wave of abolition has been influenced greatly by the process of democratisation in Europe, including the former Soviet empire, and freedom from colonialism and post-colonial repression in Africa and several other parts of the world, including Cambodia in Asia. Foremost among these influences has been the development of international human rights law and international covenants and treaties to put them into effect (notably Protocol No. 2 to the ICCPR (1989) and Protocols Nos. 6 (1983) and 13 (2002) to the ECHR),¹⁴ as well as new democratically inspired

¹⁴ Also, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty (1990). See Hood and Hoyle, 4th ed, 22-24.

Constitutions in many countries that specifically ban the death penalty under their right to life provisions. Altogether, 82 countries have ratified or signed one or other of the international treaties or conventions which bars the imposition and reintroduction of capital punishment.

The human rights approach to abolition rejects the most persistent of justifications for capital punishment: retribution and the need to denounce and expiate through execution those whose crimes shock society by their brutality. It also rejects the utilitarian justification that nothing less severe can act as a sufficient deterrent to those who contemplate committing capital crimes. This is not only because the social science evidence does not support the claim that capital punishment is necessary to deter murder, but because even if it could have a marginal deterrent effect, it could only be achieved by high rates of execution, mandatorily and speedily enforced. This, abolitionists assert, would increase the probability of innocent or wrongfully convicted persons being executed and also lead to the execution of people who, because of the mitigating circumstances in which their crimes were committed, do not deserve to die.

It has needed political leadership and judicial support, backed up by NGOs, especially but not only Amnesty International, to bring about abolition. Political will has been the key. The abolitionists believe that although public opinion is not to be ignored, the task is to inform and lead the general public to appreciate and then to accept the case for abolition. In many of the countries of Eastern Europe and former soviet Central Asia, as well as in Africa, Presidents have led the way in bringing about abolition, or the matter has been referred for determination to the Constitutional Court.

The main motor producing the political momentum behind the international movement has been the commitment of the Council of Europe since 1994 and then of the powerful European Union since 1998 to make abolition a condition of membership, not only to secure a 'death penalty free' continent, but furthermore, through a diplomatic offensive, to work to convince 'third countries' that "the abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights".

The premise of the anti-capital punishment movement, simply put, is that the execution of captive citizens, whatever crimes they had committed and wherever they reside in the world, is a fundamental denial of their humanity and right to existence. Indeed countries of the EU and several others bar the extradition of persons who might face the death penalty without a solid assurance from the requesting country that the person concerned will not, if convicted, be sentenced to death or executed.

The influence exerted by the weight of numbers as more countries have embraced abolition is illustrated by the change in the decisions reached regarding extradition of prisoners from Canada to the USA. Whereas in 1991 in the case of *Kindler v Canada*, both the Canadian Supreme Court and the United Nations Human Rights Committee held that there was no bar to extradition because there was no international consensus on the issue of capital punishment, 10 years later in *Burns v USA* (2001) and *Judge v Canada* (2003) both bodies held that it would be a violation of the defendant's right to life to extradite without assurances that he would not be executed. They did so because, as the Canadian Supreme Court put it, of the "significant movement towards acceptance internationally of a principle of fundamental justice ... namely the abolition of capital punishment."¹⁵ In similar vein, in the case of *Öcalan v Turkey* in March 2003, the European Court of Human Rights endorsed the view that capital punishment amounts to a form of inhuman treatment which can "no longer be seen as having any legitimate place in a democratic society."¹⁶

5. Indicators for the Future

How strong is the resistance likely to be to the continuing pressure from abolitionist nations on retentionist countries to accept the view that capital punishment should be condemned worldwide? There is no doubt that some of the retentionist countries have regarded resolutions for a moratorium on all executions brought before the United Nations as 'divisive' and an attempt to impose the will of the majority on the minority.

¹⁵ Cited in Hood and Hoyle, 4th ed. at 29-31.

¹⁶ *Ibid.* cited at p. 27.

The pressure from the abolitionists has even been stigmatized as a form of cultural imperialism: an attack on sovereignty.

Certainly the battle is not over, but one indicator of the way in which it is moving is the quite dramatic decrease in recent years in the number of countries which continue to oppose such resolutions when brought before United Nations bodies. As recently as 2005 at the UN Commission on Human Rights, 66 countries dissociated themselves from a resolution calling for a world-wide moratorium on executions. Yet, in December 2008 only 46 countries voted against a similar resolution when it came before the General Assembly.

Among the 48 countries that were ‘actively retentionist’ in December 2008 (by which I mean they had executed at least one person in the past 10 years) and the 10 countries that had not executed anyone during that period, but were not regarded by Amnesty International as truly ‘abolitionist in practice’ – a total of 58 nations, 19 (30%) did not oppose the UN moratorium resolution, indicating that they did not follow the hard ‘sovereign criminal justice’ line. Of the 39 which did oppose the resolution, the largest group (17) consisted of countries with a majority Muslim population.¹⁷ Their stance I have already briefly discussed. It is more surprising that the next largest group was 15 countries of the British Commonwealth (11 of them island states in the Caribbean, plus Botswana, India, Singapore and Uganda).

As far as the non-Muslim majority Commonwealth countries are concerned, resistance to abolition is most evident in Singapore and in the island states of the Anglophone Caribbean, nearly all of whom (the only exception being St Kitts and Nevis) may best be classified as ‘thwarted’ executioners. They have been thwarted by the activities of The Death Penalty Project and other dedicated human rights lawyers who have challenged the constitutionality of the death penalty, particularly the mandatory death penalty, conditions and length of time on death row and many aspects of the procedures leading to conviction, sentence and beyond, including clemency. But so far, as in Jamaica last year,

¹⁷ Afghanistan, Bangladesh, Egypt, Comoros (ADF). Indonesia, Iran, Iraq, Kuwait, Libya, Malaysia, Nigeria, Pakistan, Qatar, Saudi Arabia, Sudan, Syria and Yemen.

attempts to abolish capital punishment have been unsuccessful; largely because of the impact on opinion of the very high homicide rates that currently blight some of these countries. Nevertheless the death penalty is largely a symbolic sentence. Altogether, only a third of Commonwealth countries have abolished the death penalty in law, compared with 60 per cent of all other nations.¹⁸ It seems to me extraordinary that the Commonwealth, which prides itself on its stance on human rights, should have been so slow to embrace abolition of the death penalty as one of its goals.

Of the remaining countries that opposed the UN resolution, five were in non-Muslim or non-Commonwealth Asia (China, Japan, North Korea, Mongolia and Thailand - I have already noted new developments in Japan and Mongolia); one in Africa (Zimbabwe); and in Europe and the Americas only the USA.

Today I only have time to discuss the position as regards the movement towards abolition of two key countries. In the East, the People's Republic of China, and in the West, the United States of America.

I have had the good fortune to visit China frequently over the past nine years to take part in discussions and seminars on the subject of the death penalty, often in the company of Saul Lehrfreund and Parvais Jabbar. During this period I have witnessed a remarkable transformation in the debate and in the open-mindedness of our Chinese colleagues. They have moved from an entirely defensive posture to one which recognises that reform of China's capital laws are necessary and an acceptance that abolition is a goal that should be pursued, even if the Chinese authorities are not yet ready to go so far.

China has until very recently pursued a vigorous policy of using capital punishment in its 'strike-hard' campaigns against a wide variety of capital crimes – there are 68 of them, including economic and sexual crimes as well as various offences against the state, although in practice always at the discretion of the court. During an EU-China Human

¹⁸ For a more detailed analysis, see Roger Hood, 'Capital Punishment: The Commonwealth in World Perspective', *The Commonwealth Lawyer*, 17(3), 2008, pp. 30-35.

Rights Seminar on the Death Penalty in which I took part in the spring of 2001, a strike hard campaign apparently accounted for at least 1,000 executions within one month! The reasons put forward both to explain and justify why the death penalty is regarded as still essential to the maintenance of order and stability in China have included the belief that retribution based on the notion of ‘a life for a life’ is deeply embedded in Chinese culture; that it, therefore, has the overwhelming support of the population; that ignoring this support might cause social instability; and that given the present state of China’s social, political and economic development and very large population it remains necessary as a deterrent. Nevertheless a vigorous debate on the ‘reform’ of the scope of the death penalty is now underway in academic, higher judicial and administrative circles. According to a recently retired senior judge of the Supreme People’s Court speaking at a conference last June at which Saul, Parvais and I were present, death penalty reform is now ‘at the top of the agenda’.

The return of the review of all death penalty verdicts from the provincial High Courts to the Supreme People’s Court at the beginning of 2007 has been of particular significance, for it signaled the introduction of measures, including the development of guidelines, aimed to ensure more consistency combined with greater parsimony in the types of crime actually punished by death and the number of persons who are in practice executed — in fact to replace previous practices with a policy which according to Chief Justice Xiao Yang, President of the Supreme People’s Court, aims to impose the death penalty ‘strictly, cautiously and fairly ...on a tiny number of serious criminal offenders.’ This is seen as part of the project of President Hu Jintao for ‘Constructing a Socialist Harmonious Society’, the criminal policy of which is to ‘Combine Punishment with Leniency’.

Unfortunately, despite the claims made that the new procedures have reduced the number of death sentences upheld and executions carried out, by at least 20 per cent, it has not been possible to chart objectively the extent of the progress made due to the complete lack of any statistical data to show how many persons are sentenced to death each year in China, how many of them after appeal have been executed, and for which categories of

offence. In the debate at the UN General Assembly in December 2007 on the resolution for a world-wide moratorium on death sentences and executions, China voted against the motion, stating that: "... in today's world, the issue was a matter of judicial process to decide on the use of or a moratorium on the death penalty, and not a matter of human rights. It was each country's right, on the basis of cultural background and other factors [to decide], when to use that punishment ... without interference." In contrast, at the workshops we attended in Guangdong and Beijing last June, Professor Zhao Bingzhi of Beijing Normal University, a strong and influential advocate of death penalty reform, stated:

"The fast headway of abolition in the globe is amazing and exciting. These latest changes present a clear signal to us: abolition is an inevitable international tide and trend as well as a signal showing the broad-mindedness of civilized countries ... [abolition] is now an international obligation ... Although such influence will not lead to any effect instantly, it facilitates the restriction of the scope of the death penalty ... as much as possible and [leads to] executing a minimum number"

As I mentioned before, one of the major barriers to progress constantly brought up at discussions in China is the assumption that public opinion is very hostile to reform because the retributive concept of a 'life for a life' is deeply embedded in Asian and Chinese culture.

Light has been shed on this issue by the recently completed EU-China project entitled 'Moving the Debate on the Death Penalty Forward', led by the Great Britain China Centre in this country,¹⁹ which included a large scale public opinion survey of nearly 4,500 Chinese citizens (a 70% response rate) in three different provinces. It was, devised by Dietrich Oberwittler and Shenghui Qi of the Max Planck Institute for Foreign and International Criminal Law at Freiburg and conducted by the Research Center for Contemporary China at Peking University.

¹⁹ In partnership with Beijing Normal University and Wuhan University in China, the Max Planck Institute for Foreign and International Criminal Law in Freiburg, the Irish Centre for Human Rights in Galway, and The Death Penalty Project in London.

An outstanding finding from this recent survey²⁰ was the low level of interest and knowledge and the relatively high proportion of respondents who had no firm opinion on the subject of the death penalty. Less than three per cent said they were ‘very interested’ and only 26 per cent were interested at all. When asked how much knowledge they had about the death penalty in China, only 1.3 per cent said they had a lot of knowledge and less than a third ‘some knowledge’.

As regards being in favour or opposing the death penalty, 58 per cent were *definitely* in favour – by no means a very high proportion when compared with the experience of European countries when they abolished capital punishment. While only 14 per cent said they opposed capital punishment, as many as 28 percent were recorded as being ‘unsure’. When asked whether China should speed up the process to abolish the death penalty, only 53 per cent were opposed to doing so and a further 33 per cent were ‘unsure’. This can hardly be said to indicate a fervent desire for capital punishment of a kind that would make abolition politically impossible to achieve.

More evidence to suggest that attitudes were not hardened and inflexible on this subject came forth when respondents were asked whether they supported the death penalty for specific crimes. For only two crimes, well over half the respondents supported the use of capital punishment: for murder (77%) and intentional injury causing death (60%); and only just over a half supported it for drug dealing (54%) and sexual abuse of a girl under the age of 14 (52%). For no other category of offence for which the death penalty can presently be imposed was there a majority in favour of capital punishment, suggesting that the government would not have great opposition to expunging most of the 68 capital offences from the criminal code so as to comply, pending complete abolition, with the meaning and spirit of Article 6(2) of the ICCPR, which China has signed but has yet to ratify.

²⁰ http://www.mpicc.de/shared/data/pdf/forschung_aktuell_41.pdf I had the honour to be consultant to this project.

Furthermore, there was evidence that the members of public surveyed, despite their general endorsement of the death penalty, would wish to see it imposed only in the most extreme cases of murder. This was evident when they were provided with ‘scenarios’ of a crime with various aggravating and mitigating features: for instance, the death penalty was supported by less than 50 per cent of respondents even for a man who had served two previous prison sentences for robbery and who now had robbed a convenience store of 2,000 Yuan (about £200) and killed the store-owner by shooting him in the head.

The survey also showed that 60 per cent of the population endorsed the view that ‘Innocent people may be wrongly executed’ and of those who supported the death penalty or were undecided, only 25 per cent said they would definitely favour the death penalty if it were proven that innocent people had been executed, while 44 per cent would definitely oppose it, with nearly a third being ‘unsure’. About 70 per cent thought that the death penalty was “unequally or unfairly applied”. When, as in surveys in the United States, respondents were asked whether they would support the death penalty if various alternatives were available, a substantially lower proportion supported retention. If the death penalty were replaced by life imprisonment with the possibility of parole, those who said they would still favour the death penalty accounted for only 41 per cent of the Chinese general population. If the alternative maximum sentence were to be raised to the very harsh penalty of life with no possibility of parole and an obligation to make restitution, only a quarter would remain in favour of the death penalty and half would definitely support abolition. Thus, the majority favoured alternative penalties that would give the public greater protection from the most dangerous offenders, not necessarily death - a ‘life for a life’ itself.

The findings of this survey therefore suggest that public opinion is not likely to be so hostile to further restriction and abolition of the death penalty as has been supposed. Those who use the ‘Asian values’ or ‘Chinese culture’ argument for retaining the death penalty should recognise that there is strong evidence close to hand that Chinese people have been able to live contentedly under penal regimes where there is no capital punishment. The Special Administrative Regions of Hong Kong and Macau prove that

amply. Indeed, although the majority of the Hong Kong population favoured capital punishment prior to the abolition of the death penalty by the colonial British regime in 1993, there have, as Johnson and Zimring have shown, been no serious calls or pressure there for its reintroduction and furthermore a continuing decline in the homicide rate.²¹

Further progress in China will depend on the extent to which the academic and judicial elite can influence the political policy makers to accept that the question of whether a modern state should employ the death penalty has advanced to the point when it ought no longer to be conceived narrowly as an acceptable form of crime control governed entirely by national sovereignty. Ratification of the ICCPR would be a great step forward.

Let me now turn briefly to the United States whose position on this issue, given its general championing of human rights in other countries, seems to me to be crucial to achieving the goal of world-wide abolition. The United States has yet to embrace publicly, as China has done the aspiration to abolish the death penalty in due course. So what, briefly, are the prospects that the USA will abandon capital punishment?

In recent years there has been some recognition by the US Supreme Court of norms that have been established elsewhere in the world. The decisions to ban the execution of the so-called mentally retarded (*Atkins v Virginia*, 2002) and of juveniles convicted of murders committed before the age of 18 (*Roper v Simmons*, 2005), both cited worldwide condemnation of these practices as embodied in the ICCPR and the 1983 UN Safeguards for those facing the Death Penalty, albeit many years after their promulgation.²²

To what extent the Supreme Court will build on these judgments, as capital punishment comes under more and more critical scrutiny in the USA, remains to be seen. Last year, the influential American Law Institute, which had crafted the model for death sentencing accepted by the Supreme Court in 1976, concluded "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for

²¹ See David T. Johnson and Franklin E. Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia*, New York: Oxford University Press, 2009.

²² For further information on this, see Hood and Hoyle, 4th ed., 192-4 and 200-203.

administering capital punishment" that it, would no longer retain a policy which supported the death penalty. Given the evidence of the low incidence of executions in all but a handful of states such that the death penalty has been described aptly by Carol Steiker and Jordan Steiker, as 'A Tale of Two Nations';²³ given the concerns widely expressed about the wrongful convictions unearthed by 'Innocence projects' and the certainty of innocence provided by DNA evidence; given the impossibility of extinguishing all arbitrariness and discrimination; given the excessive and costly delays in the administration of capital punishment such that the expense of continuing with a system that results in so few executions is now being questioned in many states; and given the cruelty inherent in the 'death row' phenomenon and the administration of execution; it seems likely that many more states that retain the death penalty but rarely carry out executions will, in due course, follow the example of New York, New Jersey and New Mexico to abolish it. Indeed 11 state legislatures discussed the issue last year. Success would leave only a few 'outliers' and maybe in the end only Texas as an executing state.

At that stage it would be possible, even likely, that the Supreme Court would declare that there really has been an evolution in 'the evolving standards of decency that mark the progress of a maturing society',²⁴ at home as well as abroad, which deplores the use of capital punishment. Then it would be possible for the Federal Government to ratify the Second Optional Protocol to the ICCPR. If this comes to pass, countries which continue to claim that capital punishment is not inconsistent with respect for human dignity and human rights will receive a body blow.

5. In Conclusion

The emphasis on the 'human rights' perspective on the death penalty has added greatly to the moral force propelling the abolitionist movement. Those who still favour capital punishment 'in principle' have been faced with convincing evidence of the abuses,

²³ Carol Steiker and Jordan Steiker, 'A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States', *Texas Law Review*, vol. 84, 2006, 1869-1927. 2006.

²⁴ To follow the standard set in *Trop v Dulles*, 356 US. 86. 101 (1958).

discrimination, mistakes, and inhumanity which inevitably accompany it in practice. In general it needs to be remembered that no countries have abolished the death penalty because of popular demand as reflected in opinion polls. Those who grew up with the expectation that death would be the punishment for murder are relatively slow to abandon this idea, but the next generation, growing to maturity with no such experience, is far more likely to regard capital punishment as a barbaric relic of the past, abandoned as civilization has progressed.

While the road is still rocky and the end is not yet in sight, abolitionists have reason to be confident that the final destination is approaching when all countries will have agreed that the killing of captive criminals should be outlawed for ever.